FILE COPY

IN THE

Supreme Court of the United States

October Term, 1939.

No 68

WILLIAM HELIS,

Petitioner,

versus

MRS. ITASCA KINNEY WARD, as Executrix of the Estate of Bryan Ward, deceased, et al.,

Respondents.

BRIEF ON BEHALF OF WILLIAM HELIS, PETITIONER.

EUGENE D. SAUNDERS,
Attorney for Petitioner.

LLOYD J. COBB,
Of Counsel.

SUBJECT INDEX

	PAGE
PINIONS OF THE COURTS BELOW	1
RISDICTION	2
ECIFICATION OF ERRORS	3
ATEMENT OF THE CASE	3
RGUMENT	8

TABLE OF CASES CITED

llins v. Yosemite Park & Curry Co., 304 U. S. 518	12
lumbus Gas & Fuel Co. v. City of Columbus, 55 F. (2d) 56	12
ke Power Co. v. Greenwood County, 299 U. S. 259, 268	2, 12
ie R. Co. v. Tompkins, 304 U. S. 64	2, 12
ulks v. Schrider, 90 F. (2d) 370	13
fth Third Nat'l Bank v. Johnson, 219 F. 89, 95	12
nefrock v. Kenova Mine Car Co., 22 F. (2d) 627	13
milton Gas Co. v. Watters, 75 F. (2d) 176	13
ghes v. Reed, 46 F. (2d) 435	13
tcher & Moore Lumber Co. v. Knight, 216 U. S. 257, 267	2, 11
unders v. Shaw, 244 U. S. 317	2, 12
derwood v. Com'n of Internal Revenue, 56 F. (2d) 67	13
S. v. Rio Grande Dam & Irrigation Co., 184 U. S. 416	12
lling v. Binenstock, 302 U. S. 272	2, 12
lson v. Spencer, 261 F. 357	13

TABLE OF STATUTES CITED

S. Code, Title 28, Section 347 (a)	2

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1939.

No. 68.

WILLIAM HELIS,

Petitioner,

versus

MRS. ITASCA KINNEY WARD, as Executrix of the Estate of Bryan Ward, deceased, et al.,

Respondents.

BRIEF ON BEHALF OF WILLIAM HELIS, PETITIONER.

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

Your petitioner respectfully shows:

I.

OPINIONS OF THE COURTS BELOW.

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit (R. 229) is reported in 102 F. (2d) 519; and the opinion of the United States

District Court for the Eastern District of Louisiana (R. 85) is reported in 20 F. Supp. 514.

II.

JURISDICTION.

1. The date of the judgment to be reviewed is March 24, 1939 (R. 229).

2. The statutory provision which is believed to sustain the jurisdiction of this court is U. S. Code, Title 28, Section 347 (a).

3. The trial court excluded all evidence designed to show the amount of oil which a certain oil well was capable of producing on other than a 3/8-inch choke (R. 103). The Circuit Court of Appeals predicated its decision entirely upon its finding of fact as to the capacity of said oil well on chokes other than a 3/8-inch choke (R. 237). In so deciding the Circuit Court of Appeals acted upon a theory not tried in the District Court and thereby deprived petitioner of his day in court.

4. The cases believed to sustain the jurisdiction of this court are as follows:

Willing v. Binenstock, 302 U. S. 272;
Erie R. Co. v. Tompkins, 304 U. S. 64;
Duke Power Co. v. Greenwood County, 299 U. S. 259;
Lutcher & Moore Lumber Co. v. Knight, 216 U. S. 257;
Saunders v. Shaw, 244 U. S. 317.

III.

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals erred by deciding the merits of this case on a theory which had never been tried by the litigants and as to which the trial court had, upon the objection of petitioner, excluded all evidence.

IV.

STATEMENT OF CASE.

Your Honors have granted certiorari herein limited to the question of whether the Circuit Court of Appeals should have granted a new trial. We will accordingly confine our statement of the case to such facts as are relevant to this single issue.

Petitioner, by a written instrument (R. 26) was granted an option to purchase a certain oil lease owned by Iberia Oil Corporation and Y. D. Spell. Prior to the institution of this suit Iberia Oil Corporation was dissolved and all of its rights in the above mentioned contract, and the oil lease therein referred to, were transferred to respondents herein. At the time of the execution of this option contract respondents predecessors in title had completed one oil well and were drilling a second oil well on the leased property, which second well was known as "Bernard No. 2" and which they agreed to drill to completion (R. 27). Petitioner obligated himself to commence the drilling of a third oil well on said leased property, to be known as "Bernard No. 3," and to drill such well to completion or abandonment (R. 27).

The amount of the purchase price to be paid by petitioner was made dependent upon the volume of production of either of these two oil wells; it being provided by paragraph 3 of said contract:

> "(a) In the event the Bernard No. 2 well or the Bernard No. 3 well should be brought in as producers the purchase price of the leasehold interest shall be $300,000.00 if the average daily production of said wells for a period of fifteen days after completion is less than 3000 barrels each, calculated on a 3/8-inch choke according to the methods usually employed in gauging the capacity of oil wells.
>
> "(b) In the event either the Bernard No. 2 or the Bernard No. 3 well should be brought in capable of producing more than 3000 barrels per day, calculated as above set forth, then the purchase price shall be $400,000.00." (R. 28.)

Bernard No. 2 well was a failure and was abandoned but petitioner completed Bernard No. 3 as a producing oil well and thereupon gave to respondents timely notice of his election to exercise his option to purchase the oil lease.

Respondents immediately contended that the volume of production of Bernard No. 3 well was such that the purchase price should be $400,000.00. Petitioner contended the price should be $300,000.00. The instant suit was instituted for the purpose of having the amount of the purchase price judicially determined. Petitioner contended that the purchase price should be $300,000.00 because the Bernard No. 3 well was not capable of producing more than 3,000 barrels of oil per day for a period of fifteen

days after completion, calculated upon a 3/8-inch choke. Respondents contended that the purchase price should be $400,000.00 because the Bernard No. 3 well was capable of producing more than 3,000 barrels of oil per day.

A choke is a device inserted in the pipe of an oil well which, like a nozzle, reduces the size of the orifice through which the liquid is permitted to flow.

Upon the trial before the District Court respondents sought to introduce evidence showing tests and calculations made of the production of the Bernard No. 3 well on chokes of three different sizes. Petitioner immediately made the following objection:

> "We object to any testimony by this witness with respect to three tests, on the ground that paragraph 3 of the contract of February 6th provides that the capacity of the well shall be calculated on a 3/8th inch choke according to the usual methods employed in gauging the capacity of oil wells, and that the capacity shall be based on average daily production for a period of 15 days after completion of the well, and that it is wholly immaterial to the issue involved herein, on any choke except 3/8th inch." (R. 103.)

Upon which objection the court ruled:

> "I sustain the objection. The witness' report is already in, but I will allow him to testify as to the 3/8th inch choke." (R. 103.)

Subsequently and repeatedly throughout the trial the District Judge ruled that the only issue in the case was the capacity of this well calculated on a 3/8-inch choke.

Every effort by counsel for respondent to escape the effect of the court's ruling was made the subject of objection and each such objection was sustained.

At one point counsel for respondents sought to introduce evidence of a hypothetical nature. The objection and ruling were:

> "I object your Honor. The sole question before the Court under the contract is how much the well produced during the period of 15 days after completion, calculated on the 3/8th inch choke according to the usual method employed in gauging the capacity of the oil well."
>
> "The Court:
> "I sustain the objection." (R. 114).

Other statements made by the Trial Judge during the course of the trial and which disclose beyond any question of doubt the theory of such trial are the following:

> "My idea about it is this. The Court does not think there is any ambiguity in the contract at all, and I do not see any necessity of evidence to try and explain the contract. I think it is quite clear anyone reading it can understand it." (R. 107.)
>
> "I cannot see that it makes any difference what he has seen. It is what this well did on a 3/8th inch choke." (R. 119.)
>
> "The capacity is to be calculated on a 3/8th inch choke." (R. 119.)

Based on these rulings of the trial judge the case was tried, submitted and decided upon the theory that the amount of the purchase price should be determined

by the capacity of the well "calculated upon a 3/8th-inch choke." Petitioner did not attempt to introduce evidence touching upon any other method of calculation and respondents were not permitted to do so. The evidence in the records is conclusive, in fact we understand respondents to concede, that the Bernard No. 3 well could not produce as much as 3,000 barrels per day on a 3/8-inch choke and the trial judge accordingly entered judgment for petitioner decreeing $300,000.00 to be the correct amount of the purchase price.

Respondents appealed to the Circuit Court of Appeals and that court held that the District Judge had erred in holding that the contract required the capacity of the well to be determined by calculations and tests made solely upon a 3/8-inch choke. The appellate court held that the rights of the parties should "be determined by the amount of oil the well is capable of producing in a day" (R. 233) and that this should be determined by tests made upon a series of chokes (R. 234). The Circuit Court of Appeals further held that the evidence in the record showed that the well was capable of producing more than 3,000 barrels of oil per day and it accordingly reversed the judgment of the District Court and directed that judgment be entered decreeing the purchase price to be $400,000.00 (R. 235).

Petitioner applied for a rehearing which was denied (R. 243).

V.

ARGUMENT.

When a litigant objects to the introduction of evidence and the objection is sustained he is fully justified in relying on such ruling. He need not introduce evidence to refute a point which the trial court upon his objection has ruled to be irrelevant and not involved in the litigation. A litigant is deprived of his day in court and of due process of law when a court, either trial or appellate, decides a case against him upon a point which he has not tried because of justifiable reliance upon a ruling of the trial judge.

The Circuit Court of Appeals pointed out that its determination of this case necessarily depended upon which of two possible theories it should adopt, saying:

> "Our decision must turn upon the following questions: (1) Is the purchase price of the property to be determined by the amount of oil that can be produced by the well in a day through a 3/8-inch choke? (2) Is the purchase price of the property to be determined by the amount of oil the well is capable of producing in a day?" (R. 233.)

It then set forth its reasons for concluding that the second theory was the correct method of construing the contract and concluded by saying of the first theory:

> "• • • Such a construction of the test is an afterthought and the learned trial Judge fell into error in following it." (R. 235.)

Thus it appears upon the face of the opinion of the Circuit Court of Appeals that:

(1) The first and fundamental point presented for determination was the construction to be given the written contract.

(2) Two distinct and different theories of construction were urged by the litigants.

(3) The District Court adopted a construction declared to be erroneous.

The Circuit Court of Appeals held that the contract should not be construed as meaning that the capacity of the well should be calculated on a 3/8-inch choke and that the correct construction required the use of a 3/8-inch choke as a base which with the use of other chokes to determine pressures and conditions would enable expert petroleum engineers to accurately calculate the amount of oil the well was capable of producing in a day. (R. 234.)

As we have pointed out, the record shows conclusively that the District Court expressly excluded the admission of evidence relevant only to the theory of construction adopted by the appellate court. Counsel for petitioner objected when the first witness made the first attempt to testify regarding tests made with chokes of different sizes. This is clearly reflected by the record.

"A. So we tested the well on three chokes the first time it was tested,—
"Objection: Mr. Cobb:

"We object to any testimony by this witness with respect to three tests, on the ground that paragraph-3 of the contract of February 6th provides that the capacity of the well shall be calculated on a 3/8th inch choke according to the usual methods employed in gauging the capacity of oil wells, and that the capacity shall be based on average daily production for a period of 15 days after completion of the well, and that it is wholly immaterial to the issue involved herein, on any choke except 3/8th inch."

"The Court:

"I sustain the objection. The witness' report is already in, but I will allow him to testify as to the 3/8th inch choke." (R. 103.)

The trial judge never receded from this ruling. To the contrary, as we have pointed out in our statement of the case, he repeatedly sustained the same objection and to the very end of the trial limited the evidence to such as was relevant to what he had ruled to be the proper construction of the contract, viz.: the capacity of the well calculated on a 3/8-inch choke for a fifteen day period following its completion.

In view of this ruling petitioner did not and could not make any effort to meet the issue which the Circuit Court of Appeals subsequently ruled to be the only issue in the case, viz.: the maximum capacity of the well determined by tests made upon a series of chokes.

Petitioner was, we respectfully submit, entitled to rely upon the rulings of the trial judge. He could not anticipate the possibility that he would not be afforded the opportunity to litigate an issue which the appellate court might subsequently decide to have been improperly ex-

cluded by the district court. Orderly procedure requires that litigants conform to the rulings of the trial court in all matters.

The true import of the decision herein of the Circuit Court of Appeals is that the District Court erred in its ruling upon the objection to evidence and that the District Court should have received evidence intended to show the open flow capacity of the well. This is necessarily tantamount to holding that the decision of the District Court was predicated upon an incomplete and improperly made record. Obviously the real issue in the case has never been litigated when the trial judge excluded all evidence except that relating to a particular point or issue and that point or issue has been declared by the appellate court to be immaterial to the determination of the controversy.

Under virtually identical circumstances your Honors have declared that a decision such as was rendered by the Circuit Court of Appeals herein deprives a litigant of his day in Court. You said:

> "Applying this doctrine to the facts and circumstances which we have previously stated, we are of opinion that it inevitably results that the effect of the action of the circuit court of appeals was substantially to deny to the plaintiffs in error in that court, petitioners here, their day in court; in other words, was equivalent to condemning them without affording them an opportunity to be heard."
>
> *Lutcher & Moore Lumber Co. v. Knight, 217 U. S. 256, 267.*

You have held that identical procedure by the Supreme Court of a state deprived a citizen of due process of law

contrary to the Fourteenth Amendment to the Constitution of the United States, *Saunders v. Shaw*, 244 U. S. 317.

Your Honors have also said:

> "Delusive interests of haste should not be permitted to obscure substantial requirements of orderly procedure. There is no exigency here which demands that these requirements should not be enforced. The cause was heard in the Circuit Court of Appeals upon a record improperly made up. That the cause may be properly heard and determined, we reverse the decree of the Circuit Court of Appeals and remand the cause with directions that the decrees entered by the District Court be vacated, that the parties be permitted to amend their pleadings in the light of the existing facts, and that the cause be retried upon the issues thus presented."
>
> *Duke Power Co. v. Greenwood County, 299 U. S. 259, 268.*

In other decisions you have given effect to this same rule.

Collins v. Yosemite Park & Curry Co., 304 U. S. 518.

U. S. v. Rio Grande Dam & Irrigation Co., 184 U. S. 416.

Willing v. Binenstock, 302 U. S. 272.

Erie R. Co. v. Thompkins, 304 U. S. 64.

The Circuit Courts of Appeals have repeatedly recognized and followed this rule of procedure so clearly enunciated and so firmly established by your Honors.

Fifth Third National Bank v. Johnson, 219 F. 89.

Columbus Gas & Fuel Co. v. City of Columbus, 55 F. (2d) 56.

Faulks v. Schrider, 90 F. (2d) 370.
Hughes v. Reed, 46 F. (2d) 435.
Wilson v. Spencer, 261 F. 357.
Underwood v. Com'n. of Internal Revenue, 56 F. (2d) 67.
Finefrock v. Kenova Mine Car Co., 22 F. (2d) 627.
Hamilton Gas Co. v. Watters, 75 F. (2d) 176.

We respectfully submit that this petitioner should be afforded the opportunity to litigate the issue which the Circuit Court of Appeals has decreed to be the only real issue in this case and that unless this is done petitioner will have been deprived of his day in court through no fault of his but because of his entirely justifiable reliance upon the rulings of the trial judge.

PETITIONER HAS DEFENSE.

The fact that petitioner has been denied the opportunity to present a defense is, we submit, sufficient to show that he has been deprived of his day in court. The merit of his defense cannot be determined until it has been presented. We think it important to state, however, that petitioner believes he has an adequate defense and is entirely confident that a retrial of this cause on the theory announced by the Circuit Court of Appeals will result in judgment being again rendered in his favor.

The evidence relied upon by the appellate court for rendering judgment herein is the written report of a petroleum engineer (R. 211-214) and the written report of an employee of respondents (R. 204-208). Neither of

these reports was offered as evidence upon the trial and they are in the record because constituting exhibits annexed to petitioner's pleading. Both reports would, however, have been relevant because of dealing in part with tests which the trial court ruled to be properly the subject of proof.

If these reports had been offered in evidence and if their contents had been ruled relevant to the issues petitioner would have shown that they were worthless in that the conclusions or opinions expressed therein were founded on errors apparent upon the face of the reports. The report principally relied upon is contained in a letter written by Mr. W. L. Massey (R. 204). Attached to and forming part of this letter is a sheet of calculations showing the formula used and the results obtained. The complete worthlessness of this report is apparent from the fact that not one of the calculations is correctly made. We list below the answers stated in this report and the answers arrived at by a proper solution of the formulas.

	Answer Stated in Report (R. 211)	Correct Answer
First formula	504	541.96
Second formula	500	499.95
Third formula	460	461.04
Fourth formula	123	114.22

Can there properly be any feeling of assurance that this engineer would have expressed the same opinion or reached the same conclusion when working on a totally different set of figures? In any event we submit that an opinion founded on mathematical calculations can

have no value when it is known that the mathematical calculations are erroneous.

Furthermore, upon the retrial of this case we would undertake to show that the formula by which Mr. Massey made his calculations and upon which he predicated all of his conclusions is a mathematical absurdity. We venture the statement that Mr. Massey will be compelled to admit on cross-examination either that he has devised a formula unknown to and beyond the comprehension of other and more eminent hydraulic engineers or that his conclusions are predicated far more upon conjecture than upon mathematical calculation.

Thus, we most respectfully submit, it appears upon the face of the record that petitioner has serious defenses to present before judgment can be rendered upon the construction which the Circuit Court of Appeals has given to this contract. Other questions not apparent upon the record as presently made will also arise.

For the foregoing reasons we respectfully submit that your Honors should order this case to be remanded to the District Court for further trial of the issues involved.

Respectfully submitted,

EUGENE D. SAUNDERS,
Attorney for Petitioner.

LLOYD J. COBB,
Of Counsel.